

# OHIO STATE LAW JOURNAL

Volume 51, Number 3, 1990

## The Use of Evidence of an Accused's Uncharged Misconduct to Prove *Mens Rea*: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition

EDWARD J. IMWINKELRIED\*

### I. INTRODUCTION

The accused is charged with homicide. The indictment alleges that the accused committed the murder in early 1990. During the government's case-in-chief at trial, the prosecutor calls a witness. The witness begins describing a killing which the accused supposedly committed in 1989. The defense strenuously objects that the witness's testimony is "nothing more than blatantly inadmissible evidence of the accused's general bad character." However, at sidebar the prosecutor makes an offer of proof that the 1989 killing was perpetrated with "exactly the same *modus operandi* as the 1990 murder." Given this state of the record, how should the trial judge rule on the defense objection?

Federal Rule of Evidence 404(b),<sup>1</sup> which is in effect in over thirty states as well as federal practice,<sup>2</sup> supplies the answer to the question. On the one hand, the first sentence of Rule 404(b) forbids the judge from admitting the evidence as circumstantial proof of the accused's conduct on the alleged occasion in 1990. That sentence provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."<sup>3</sup> Figure 1 depicts the theory of admissibility banned by the first sentence of the rule.<sup>4</sup> Thus, the prosecutor cannot offer the witness's testimony about the 1989 incident to prove the accused's disposition toward murder and, in turn, use the accused's antisocial disposition as evidence that the accused committed the alleged 1990 murder.

On the other hand, the second sentence of Rule 404(b) permits the judge to admit the evidence when it is relevant on a noncharacter theory. That sentence reads that uncharged misconduct evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation,

---

\* Professor of Law, University of California, at Davis. B.A., 1967, J.D., 1969, University of San Francisco. Former Chair, Evidence Section, American Association of Law Schools. The author would like to express his appreciation to Mr. Joseph de Ulloa, Class of 1991, University of California, at Davis, and Mr. David Kornbluh, Class of 1992, who served as the author's research assistants on this article. This article is based upon an article written for the *Military Law Review*, to be published later this year, and is reprinted with permission.

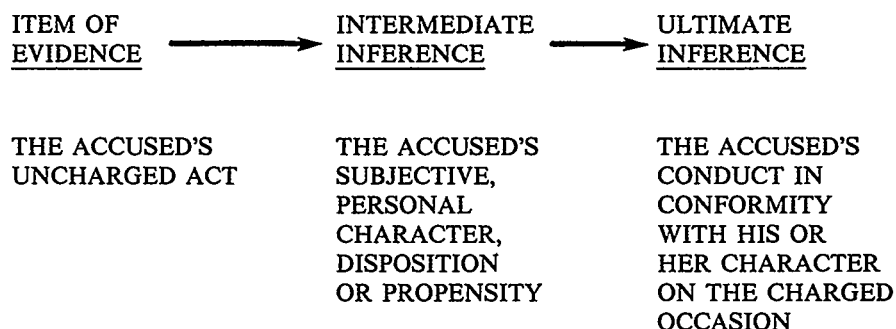
1. FED. R. EVID. 404(b).

2. R. CARLSON, E. IMWINKELRIED & E. KIONKA, MATERIALS FOR THE STUDY OF EVIDENCE 2 (Supp. 1989).

3. FED. R. EVID. 404(b).

4. E. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:18, at 48 (1984).

Figure 1



plan, knowledge, identity, or absence of mistake or accident.”<sup>5</sup> In our hypothetical case, the trial judge could allow the prosecutor to introduce the 1989 incident to establish the accused’s identity as the perpetrator of the 1990 killing. If the two killings were committed with the identical, unique *modus operandi*, the uncharged incident is logically relevant to prove the accused’s identity as the perpetrator of the charged crime without relying on a verboten character inference.<sup>6</sup> Hence, the judge could properly admit the testimony with a limiting instruction<sup>7</sup> identifying the permissible and impermissible uses of the evidence.

The admissibility of uncharged misconduct evidence is the single most important issue in contemporary criminal evidence law.<sup>8</sup> The issue has figured importantly in several of the most celebrated criminal trials of our time. Although Wayne Williams was formally charged with the murders of only Nathaniel Carter and Jimmy Ray Payne, the Georgia trial judge permitted the prosecutor to introduce evidence about ten other killings.<sup>9</sup> The national media made the prosecution’s hair and fiber evidence the centerpiece of the trial, but that evidence was merely a means to the end of tying all twelve killings together. Similarly, uncharged misconduct evidence was a vital part of the prosecution’s case against Claus von Bulow; the prosecution presented testimony about the accused’s affair with Mrs. Isles on the theory that the affair supplied the motive for the accused’s attempt to kill his millionairess wife.<sup>10</sup>

---

5. FED. R. EVID. 404(b).

6. E. IMWINKELRIED, *supra* note 4, §§ 3:10-14.

7. FED. R. EVID. 105.

8. Imwinkelried, *Uncharged Misconduct: One of the Most Misunderstood Issues in Criminal Evidence*, 1 CRIM. JUST. 6, 7 (1986).

9. *Williams v. State*, 251 Ga. 749, 312 S.E.2d 40 (1983).

10. E. IMWINKELRIED, *supra* note 4, § 1:01, at 2.

The numbers confirm the importance of the issue of uncharged misconduct evidence.<sup>11</sup> Rule 404(b) has generated more published opinions than any other subsection of the Federal Rules.<sup>12</sup> In many jurisdictions, alleged errors in the admission of uncharged misconduct evidence are the most common ground for appeal in criminal cases.<sup>13</sup> In some jurisdictions, errors in the introduction of uncharged misconduct are the most frequent basis for reversal in criminal cases.<sup>14</sup>

Recent years have witnessed several frontal assaults on the first prong of the uncharged misconduct doctrine, prohibiting the prosecutor from offering evidence of an accused's uncharged crimes on a character theory as circumstantial proof of conduct. Some commentators have argued that the distinction between character and noncharacter theories of relevance is illusory; according to this argument, even the purportedly noncharacter theories entail assumptions about the accused's tendencies and disposition.<sup>15</sup> Alternatively, other commentators have contended that an accused's uncharged crimes can be so highly probative even on a character theory that it would be irrational to exclude them.<sup>16</sup> In one jurisdiction, prosecutors have argued that a proposition adopted by the state electorate has the effect of abolishing the general ban on evidence of an accused's bad character.<sup>17</sup>

To date, the direct attacks on the character evidence prohibition have been unsuccessful. The American Bar Association Criminal Justice Section's Committee on Rules of Criminal Procedure and Evidence recently reaffirmed the distinction between character and noncharacter theories of logical relevance.<sup>18</sup> For their part, the courts have uniformly declined the invitation to overturn the character evidence prohibition.<sup>19</sup>

11. Imwinkelried, *The Plan Theory for Admitting Evidence of the Defendant's Uncharged Crimes: A Microcosm of the Flaws in the Uncharged Misconduct Doctrine*, 50 MO. L. REV. 1, 2 (1985).

12. 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 404[08], at 404-56 (1989); S. SALTZBURG, L. SCHINASI & D. SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL 361 (2d ed. 1986) ("heavily litigated in federal and military courts").

13. 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5239, at 427 (1978).

14. *Evidence—The Emotional Propensity Exception: State v. Treadaway* 1978 ARIZ. ST. L.J. 153, 156 n.29.

15. See generally Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777 (1981).

16. Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 883, 890 (1982). See also Hutton, *Commentary: Prior Bad Acts Evidence in Cases of Sexual Contact With a Child*, 34 S.D. L. REV. 604 (1989) (urging the recognition of a limited sexual offender exception to the general character evidence prohibition in child sexual abuse prosecutions).

17. In 1982, the California electorate adopted Proposition 8, amending the state constitution. *Mendez, California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003 (1984). California prosecutors have argued that Proposition 8 overturns the character evidence prohibition in that state. E.g., *People v. Jordan*, 202 Cal. App. 3d 1127, 249 Cal. Rptr. 269 (1988); *People v. Nible*, 200 Cal. App. 3d 838, 846 n.5, 247 Cal. Rptr. 396, 400 n.5 (1988); *People v. Perkins*, 159 Cal. App. 3d 646, 205 Cal. Rptr. 625 (1984).

18. ABA Comm. On Rules of Crim. Proc. & Evid., Crim. Just. Sect., Federal Rules of Evidence: A Fresh Review and Evaluation 28 (1987) ("a line can be drawn based on whether or not the proof's line of reasoning seeks to make use of the particular propensity known as 'character'").

19. *Frank v. Superior Court*, 48 Cal. 3d 632, 770 P.2d 1119, 257 Cal. Rptr. 550 (1989); *People v. Perkins*, 159 Cal. App. 3d 646, 205 Cal. Rptr. 625 (1984); *Williams v. Superior Court*, 36 Cal. 3d 441, 449 n.6, 683 P.2d 699, 704 n.6, 204 Cal. Rptr. 700, 705 n.6 (1984).

However, the advocates of the traditional ban on character evidence should take little solace from the failure of the direct attacks on the ban. Notwithstanding the failure of the direct attacks, the ban is imperiled. The threat to the ban arises from two emerging lines of case law governing the use of an accused's uncharged misconduct to prove the accused's *mens rea*. The use of the defendant's other crimes to prove intent is already the most widely used basis for admitting uncharged misconduct evidence.<sup>20</sup> These new lines of authority, however, threaten to expand the admissibility of uncharged misconduct to establish *mens rea* to the point that this use of the evidence may substantially undermine the character evidence prohibition.

The purpose of this article is to describe and critique these two lines of authority. Section II of the article discusses one line, namely, the case law advancing the proposition that the first sentence in Rule 404(b) is automatically inapplicable whenever the prosecutor offers uncharged misconduct to support an ultimate inference of mental intent rather than physical conduct. The next section of the article analyzes the second line of authority. That line includes the decisions urging that under the doctrine of objective chances, the prosecutor can routinely offer uncharged misconduct on a noncharacter theory to prove intent. Both lines of authority are spurious, and both represent grave threats to the continued viability of the character evidence prohibition.

## II. THE DOCTRINE THAT THE CHARACTER EVIDENCE PROHIBITION IS INAPPLICABLE WHEN THE PROSECUTOR OFFERS THE ACCUSED'S UNCHARGED MISCONDUCT TO ESTABLISH THE ULTIMATE INFERENCE OF THE ACCUSED'S *MENS REA*

The first sentence of Rule 404(b) embodies the character evidence prohibition. In pertinent part, the first sentence of Rule 404(b) precludes a prosecutor from introducing evidence of an accused's other crimes "to prove the [accused's bad] character . . . in order to show action in conformity therewith."<sup>21</sup> On its face, the wording of the rule suggests that the rule comes into play only when the prosecutor offers the uncharged misconduct to support an ultimate inference of conduct.<sup>22</sup> Suppose that in a given case, the prosecutor offers testimony about the accused's uncharged misconduct to support the ultimate inference that the accused committed the charged offense with the requisite *mens rea*. Figure 2 depicts the prosecutor's theory of admissibility. Given the wording of the first sentence of Rule 404(b), the prohibition is arguably inapplicable whenever the prosecutor proposes relying on this theory of admissibility. The prosecutor will argue that an inference of *mens rea* differs from an inference of action or conduct.<sup>23</sup>

---

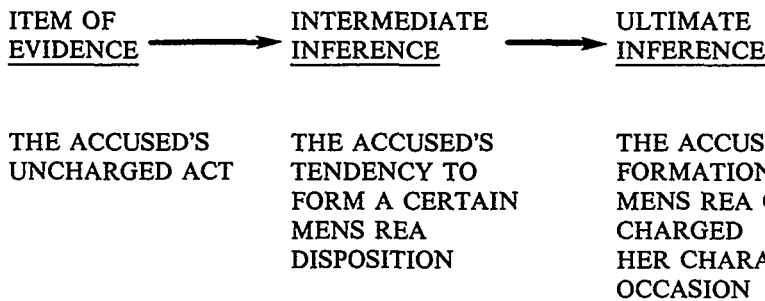
20. 22 C. WRIGHT & K. GRAHAM, *supra* note 13, § 5242; Reed, *The Development of the Propensity Rule in Federal Criminal Causes 1840-1975*, 51 U. CIN. L. REV. 299, 306 (1982).

21. FED. R. EVID. 404(b).

22. 22 C. WRIGHT & K. GRAHAM, *supra* note 13, § 5242, at 488; Myers, *Uncharged Misconduct Evidence in Child Abuse Litigation*, 1988 UTAH L. REV. 479, 524-25; Teitelbaum & Hertz, *Evidence II: Evidence of Other Crimes as Proof of Intent*, 13 N.M. L. REV. 423, 431 (1983).

23. See authorities cited in *supra* note 22.

Figure 2



The prosecutor's argument is not only plausible; there is a wealth of case law embracing the argument.<sup>24</sup> Indeed, it may currently be the prevailing view that the character evidence prohibition codified in Rule 404(b) is inapposite when the prosecutor's ultimate purpose is proving the accused's *mens rea*.<sup>25</sup> The California equivalent of Rule 404(b) is Evidence Code Sec. 1101(b).<sup>26</sup> The Federal Advisory Committee used § 1101(b) as one of its models in drafting Rule 404(b).<sup>27</sup> Section 1101(b) forbids the prosecution from offering uncharged misconduct evidence to support an ultimate inference of "conduct on a specified occasion."<sup>28</sup> In a recent case, the California Supreme Court emphasized that § 1101(b) forbids the prosecutor from introducing the accused's uncharged misconduct "only 'when offered to prove [defendant's] *conduct* on a specified occasion.'"<sup>29</sup> In that case, the court held that the character evidence prohibition in § 1101(b) was inapplicable because "[t]he prosecutor offered the evidence to prove defendant's state of mind . . . rather than defendant's conduct on any particular occasion."<sup>30</sup> Other decisions have similarly permitted prosecutors to argue that if an accused entertained the required *mens rea* during a similar, uncharged incident, "he probably harbor[ed] the same intent" at the time of the charged offense.<sup>31</sup>

This doctrine is a dangerous one threatening to emasculate the character evidence prohibition.<sup>32</sup> Several courts<sup>33</sup> have warned that this doctrine has the potential to swallow up the character evidence prohibition. Admittedly, that

24. Myers, *supra* note 22, at 531. See also *United States v. Weddell*, 890 F.2d 106, 107-08 (8th Cir. 1989) ("Where intent is an element of the crime charged, evidence of other acts tending to establish that element is generally admissible").

25. Myers, *supra* note 22, at 531.

26. CAL. EVID. CODE § 1101(b) (West 1990).

27. Adv. Comm. Note, FED. R. EVID. 404(b). The note twice refers to the California Law Revision Commission commentary to the proposed statute which ultimately became Evidence Code § 1101(b).

28. CAL. EVID. CODE § 1101(b) (West 1990).

29. *People v. Bittaker*, 48 Cal. 3d 1046, 1096, 774 P.2d 659, 688, 259 Cal. Rptr. 630, 659 (1989) (emphasis in the original).

30. *Id.*

31. *People v. Wade*, 44 Cal. 3d 975, 990-91, 750 P.2d 794, 244 Cal. Rptr. 905, *cert. denied*, 109 S.Ct. 248 (1988).

32. Teitelbaum & Hertz, *supra* note 22, at 431.

warning is somewhat overstated. Even if we posit that the prohibition in the first sentence of Rule 404(b) is inapplicable when uncharged misconduct is used to prove *mens rea*, evidence of the accused's uncharged misconduct would not become automatically admissible in every prosecution; the prosecutor would still have to convince the judge that the uncharged incident is similar enough to the charged offense to satisfy the requirement of logical relevance under Rule 401.<sup>34</sup> However, there is a large element of truth in the warning; the acceptance of the doctrine would represent a major inroad on the character evidence prohibition. Intent is an element of every true crime.<sup>35</sup> Accepting the premise that the character evidence prohibition is inapplicable to evidence offered to establish *mens rea*, the courts could rationalize admitting evidence of any similar uncharged crimes as a matter of course.

In the final analysis, however, the doctrine is not only dangerous; more importantly, the doctrine is unsound. A careful analysis of the theory of admissibility depicted in Figure 2 dictates the conclusion that the theory implicates the core concerns of the character evidence prohibition. In principle, the courts should treat the theory as impermissible character reasoning.

#### A. *The Policy Rationales for the Character Evidence Prohibition*

As Figure 1 demonstrates, the forbidden character theory of relevance entails two inferences. Each inference presents a distinct probative danger, and the combination of probative dangers constitutes the policy justification for the character evidence prohibition.<sup>36</sup>

The first inferential step in character reasoning is determining the type of person the accused is. This step requires the jury to focus on the accused's disposition or propensity. The jurors must ask themselves: What type of person is the accused? Is she a law-abiding, moral person or a law-breaking, immoral individual? At a conscious level, the jurors must dwell on the accused's personal character.<sup>37</sup>

While consciously deciding whether to infer the accused's subjective bad character from the accused's uncharged crimes, at a subconscious level the jurors may be tempted to punish the accused for the other crimes.<sup>38</sup> The temptation may be especially acute when the testimony indicates that the accused has not as of yet been convicted of and punished for the uncharged crime.<sup>39</sup> The uncharged misconduct evidence may create the impression that to date, the ac-

---

33. *Thompson v. United States*, 546 A.2d 414, 421 (D.C. Cir. 1988); *United States v. Oppon*, 863 F.2d 141, 149 (1st Cir. 1988) (Coffin, J., concurring). See also Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135, 152-53 (1989).

34. FED. R. EVID. 401.

35. *Thompson v. United States*, *supra* note 33; Ordover, *supra* note 33, at 152; Comment, *Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b)*, 61 WASH. L. REV. 1213, 1221 (1986).

36. E. IMWINKELRIED, *supra* note 4, § 2:18.

37. Turcott, *Similar Fact Evidence: The Boardman Legacy*, 21 CRIM. L.Q. 43, 46, 48, 54, 56 (1978-79).

38. Johnson, *The Admissibility of Extraneous Offenses in Texas Criminal Cases*, 14 S. TEX. L.J. 69, 78 (1972-73).

39. Williams, *The Problem of Similar Fact Evidence*, 5 DALHOUSIE L.J. 281, 299-300 (1979).

cused has unjustly escaped punishment for the uncharged misdeeds.<sup>40</sup> The jurors may be tempted to rectify that injustice by punishing the accused now for the uncharged crimes—even though they have a reasonable doubt about the accused's guilt of the charged offense.<sup>41</sup>

If the jury convicted the accused for that reason, the basis of the conviction would be improper. Under our accusatory criminal justice system, it is axiomatic that the accused need answer only for the crime she is currently charged with.<sup>42</sup> The Supreme Court has held that the eighth amendment ban on cruel and unusual punishment precludes a state from criminalizing a personal status such as drug addiction.<sup>43</sup> If the uncharged misconduct evidence prompts the jury to convict to punish the accused for his uncharged crimes, in effect the jury has punished the accused for his status as a recidivist. When the admission of technically relevant evidence would realistically create the risk that the jury will decide the case on an improper basis, the risk is a probative danger which may warrant the exclusion of the evidence.<sup>44</sup> In their Note to Federal Rule 403, the Advisory Committee states that Rule 403 authorizes the trial judge to exclude marginally relevant evidence which "suggest[s] decision on an improper basis . . . ."<sup>45</sup>

Like the initial inferential step in character reasoning, the second step poses a significant probative danger. Just as the jurors wrongly decide<sup>46</sup> the case if they rest their verdict on an improper basis, they may be guilty of misdecision if they overestimate the probative value of a particular item of evidence.<sup>47</sup> The jurors can commit inferential error by ascribing undue weight to the item.<sup>48</sup> This possibility of inferential error materializes when a jury engages in the second step in character reasoning.

On the one hand, the available psychological studies indicate that once they have characterized the accused's general character, the jurors are likely to attach great weight to that characterization in determining whether the accused acted "in character" on the occasion of the charged offense.<sup>49</sup> Even when they have only fragmentary data about an individual, many laypersons tend to form oversimplified perceptions of the individual's character.<sup>50</sup> Thus, having con-

---

40. *Id.*

41. *Id.*

42. Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidence in Federal Criminal Trials*, 50 U. CIN. L. REV. 713, 731 (1981); State v. Ellis: *The Other Wrongful Acts Rule, Survey of Nebraska Law—Evidence*, 15 CREIGHTON L. REV. 281, 284 (1981).

43. Robinson v. California, 370 U.S. 660 (1962). See Reed, *Admission of Other Criminal Act Evidence After Adoption of the Federal Rules of Evidence*, 53 U. CIN. L. REV. 113, 163-69 (1984).

44. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879, 889 (1988).

45. Adv. Comm. Note, FED. R. EVID. 403.

46. 6 J. BENTHAM, THE WORKS OF JEREMY BENTHAM 105-09 (J. Bowring ed. 1962).

47. Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59, 83 (1984).

48. *Id.* at 90; Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1030-31 (1977).

49. Lawson, *Credibility and Character: A Different Look at an Interminable Problem*, 50 NOTRE DAME L. REV. 758, 776 (1975).

50. Munday, *Stepping Beyond the Bounds of Credibility: The Application of Section 1(f)(ii) of the Criminal Evidence Act 1898*, CRIM. L. REV. 511, 513 (1986) ("Psychologists have reported for several decades on the tendency of people to judge one another on the basis of one outstanding 'good' or 'bad' characteristic. This is

cluded that the accused is disposed to criminal misconduct, the jurors may ascribe great significance to that conclusion in deciding whether the accused committed the charged crime.

On the other hand, the empirical studies indicate that the general construct of character is a relatively poor predictor of a person's conduct on a given occasion.<sup>51</sup> At one time, the trait theory, championed by Gordon Allport, was quite popular.<sup>52</sup> That theory viewed a person's general character as a reliable predictor of conduct across widely differing situations. However, in the 1960's Walter Mischel introduced the competing theory of specificity or situationism.<sup>53</sup> Mischel attacked the trait theory by pointing to studies showing a lack of cross-situational consistency. Those studies demonstrated that "moral conduct in one situation is not highly correlated with moral conduct in another."<sup>54</sup> In light of the available studies, we can have little confidence in the construct of character as a predictor of conduct.<sup>55</sup> Although some psychologists still subscribe to a modified version of the trait theory,<sup>56</sup> there is considerable evidence discrediting the popular faith in the predictive value of a person's general character.<sup>57</sup> Situational factors are often more determinant of human behavior.<sup>58</sup> The upshot is that the jurors may give character far more weight than it deserves.<sup>59</sup>

As previously stated, the admission of evidence of an accused's uncharged crimes creates the probative danger that the jurors will convict despite a reasonable doubt about the accused's guilt of the charged offense. Combined with that danger, the risk of the jurors' overestimation of the probative value of the accused's bad character furnishes the rationale for the character evidence prohibition prescribed by the first sentence of Rule 404(b).

#### B. *The Applicability of the Policy Rationales to the Prosecution's Use of the Accused's Uncharged Misconduct to Prove the Accused's Mens Rea*

To be sure, the theory of relevance depicted in Figure 2 differs superficially from the forbidden theory depicted in Figure 1. However, on closer scrutiny, it

---

popularly known as the 'halo effect.' In essence, it represents our propensity to oversimplify our perception of others' personalities and to take for the whole that portion of someone else's personality which happens to be visible to us. . . . This tendency to exaggerate the representativeness of particular conduct is especially dangerous in the case of the misconduct and bad character of the accused. . . .").

51. See generally Mendez, *supra* note 17; Spector, *Rule 609: A Last Plea for Its Withdrawal*, 32 OKLA. L. REV. 334, 351-53 (1979).

52. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 26 (1986-87).

53. *Id.* at 27.

54. Campbell v. Greer, 831 F.2d 700, 707 (7th Cir. 1987) (citing Burton, *Generality of Honesty Reconsidered*, 70 PSYCHOLOGY REV. 481 (1963)).

55. 22 C. WRIGHT & K. GRAHAM, *supra* note 13, § 5239.

56. Crump, *How Should We Treat Character Evidence Offered to Prove Conduct?*, 58 U. COLO. L. REV. 279, 283 (1987). For some persons, character appears to be a good predictor of behavior in specific situations. Sherman & Fazio, *Parallels Between Attitudes and Traits as Predictors of Behavior*, 51 J. PERSONALITY 308, 309, 312 (1983).

57. Mischel, *Alternatives in the Pursuit of the Predictability and Consistency of Persons: Stable Data That Yield Unstable Interpretation*, 51 J. PERSONALITY 578, 584-85 (1983).

58. Lawson, *supra* note 49, at 778-85.

59. Elliott, *The Young Person's Guide to Similar Fact Evidence-I*, 1983 CRIM. L. REV. 284, 287.



becomes clear that the two theories are indistinguishable in terms of the pertinent policy considerations. The theory depicted in Figure 2 poses both of the probative dangers inspiring the character evidence prohibition.

At the outset, it is evident that when the prosecutor relies on the theory depicted in Figure 2, there is a grave risk that the jurors will be tempted to return a guilty verdict resting on an improper basis. Evidence of the accused's uncharged misconduct is potentially prejudicial because the jurors may perceive the uncharged conduct as immoral<sup>60</sup> and consequently react adversely to the accused.<sup>61</sup> For the most part, it is the accused's wrongful intent which gives the conduct its perceived immoral quality. As Shakespeare wrote, "[T]here is nothing either good or bad, but thinking makes it so."<sup>62</sup> When a writer wants to express the thought that a person has a criminal disposition, the writer frequently describes the person as a "criminal mind"<sup>63</sup>—rather than a criminal arm or leg. Suppose that the jury concludes that the accused has a warped mind inclined to criminal intent. That conclusion can cause the jurors to experience the very type of revulsion which the character evidence prohibition is designed to guard against. As Judge Goldberg has noted, the "character" referred to in Rule 404(b) is "largely a concept of a person's psychological bent or frame of mind . . . ."<sup>64</sup>

Compounding the probative danger, the theory set out in Figure 2 also poses the second probative danger underlying the prohibition: the risk that the jury will overestimate the probative worth of the evidence.

The theory certainly requires the jury to draw an intermediate inference as to the accused's disposition or tendency to form a particular *mens rea*. The charged offense occurred at one time and place while the uncharged crime ordinarily occurs at a different time and place. To bridge the temporal and spatial gap between the two incidents,<sup>65</sup> the prosecutor must assume the accused's propensity to entertain the same intent in similar situations.<sup>66</sup> That assumption is the inescapable link between the charged and uncharged crimes.<sup>67</sup> The trier of fact can reason from the starting point of the uncharged crime to a conclusion

---

60. See generally Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777 (1981).

61. Teitelbaum, Sutton-Barbere & Johnson, *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 WIS. L. REV. 1147, 1162 (although the persons surveyed frequently differed in their evaluation of the prejudicial character of various items of evidence, "the greatest agreement . . . is found in connection with evidence suggesting immoral conduct by the defendant . . .").

62. HAMLET, Act II, Sc. 2, Line 259.

63. See generally P. ROCHE, *THE CRIMINAL MIND* (1958); DeBenedictis, *Criminal Minds*, 76 A.B.A.J. 30 (Jan. 1990).

64. *United States v. Beechum*, 582 F.2d 898, 921 (5th Cir. 1978) (Goldberg, J., dissenting), cert. denied, 440 U.S. 920 (1979); Ordoover, *Balancing the Presumptions of Guilt and Innocence: Rule 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135, 166 (1989).

65. Ordoover, *supra* note 64, at 158.

66. Myers, *Uncharged Misconduct Evidence in Child Abuse Litigation*, 1988 UTAH L. REV. 479, 526.

67. *United States v. Rubio-Estrada*, 857 F.2d 845, 853 (1st Cir. 1988) (Torruella, J., dissenting); Ordoover, *supra* note 64, at 160.

about the *mens rea* of the charged crime only through an intermediate assumption about the accused's character or propensity.<sup>68</sup>

The reliance on an assumption about a person's propensity or tendency to form the same intent creates the possibility that the jury will overvalue the uncharged misconduct evidence. If the only question were the accused's physical response, to some extent the resolution of the question would be reducible to the application of the laws of chemistry and physics. The application of the laws of the physical sciences can help predict the accused's physical reaction. It is the mental component of the accused's conduct which introduces the element of unpredictability. American criminal law operates on the assumption that the typical person possesses cognitive and volitional capacities.<sup>69</sup> The variety of ways in which the person can exercise those capacities makes it difficult to forecast the person's mental state at any given time. Even if the accused entertained a certain intent during a similar, uncharged incident, the accused may not have formed that intent on the charged occasion. The risk of overestimation exists because the response to a situation includes a variable mental component.

Despite the seeming differences between the theories depicted in Figures 1 and 2, the theories are indistinguishable in policy.<sup>70</sup> Both theories necessitate an intermediate assumption about the accused's propensity or tendency. Both theories create a risk of prejudice to the accused; in attempting to decide at a conscious level whether the accused has a tendency to entertain a certain *mens rea*, the jurors may subconsciously conclude that the accused is a repulsive, immoral individual—the type of person who should be incarcerated even if there is a reasonable doubt of his guilt of the charged offense. Finally, in applying both theories, the jury can easily overestimate the probative value of the uncharged misconduct evidence. Thus, whether the question arises at common law<sup>71</sup> or under Federal Rule 404(b),<sup>72</sup> the court should hold that the theory depicted in Figure 2 violates the character evidence prohibition.<sup>73</sup> The prohibition applies whether the ultimate inference is the physical act of pulling a trigger or the mental act of forming an intent to kill.<sup>74</sup>

---

68. Teitelbaum & Hertz, *supra* note 22, at 427, 429. See *United States v. Logan*, 18 M.J. 606, (A.F.C.M.R. 1984) (the prosecution argued "that if the accused stole items not charged it could be inferred that he had the requisite intent with regards to the items charged." The court held that the prosecution's argument was merely an attempt to demonstrate that "the accused is a 'bad man' . . .").

69. W. LAFAVE & A. SCOTT, *CRIMINAL LAW* §§ 3.1, 3.4, 3.5, 4.2 (2d ed. 1986); R. PERKINS & R. BOYCE, *CRIMINAL LAW* 826-35, 950-75 (3d ed. 1982).

70. Teitelbaum & Hertz, *supra* note 22, at 427.

71.

Even Professor Julius Stone, the staunchest supporter of the inclusionary rule, condemns this sort of reasoning as a perversion of the rule. Where the prior crime evidence is offered to prove the defendant's 'tendency' or 'mental attitude (intent) along that particular line of crime,' we are admitting evidence 'precisely for the reason that the original rule excluded it'.

Orderover, *supra* note 64, at 158 (emphasis in original).

72. Comment, *supra* note 35, at 1232 ("This reasoning fails to comport with the plain language of ER 404(b)").

73. Judge Toruella has persuasively argued for this holding in a series of cases. *United States v. Garcia-Rosa*, 876 F.2d 209, 221 (1st Cir. 1989); *United States v. Cortijo-Diaz*, 875 F.2d 13 (1st Cir. 1989); *United States v. Rubio-Estrada*, 857 F.2d 845, 853 (1st Cir. 1988) (Toruella, J., dissenting).

74. E. IMWINKELRIED, *supra* note 4, § 2:18, at 2-50.

III. THE DOCTRINE THAT THE PROSECUTOR MAY ROUTINELY OFFER EVIDENCE OF THE ACCUSED'S UNCHARGED MISCONDUCT TO PROVE INTENT UNDER THE DOCTRINE OF OBJECTIVE CHANCES WITHOUT VIOLATING THE CHARACTER EVIDENCE PROHIBITION

Section II demonstrated that the character evidence prohibition applies even when the prosecutor offers the testimony about the accused's other crimes to establish an ultimate inference of *mens rea*. For that reason, when the government contemplates offering uncharged misconduct to prove *mens rea*, it is incumbent on the prosecutor to articulate a tenable noncharacter theory of logical relevance.

In some fact situations the prosecutor can readily develop a valid, noncharacter theory of admissibility. Assume, for instance, that the accused is charged with knowing receipt of stolen goods from A on September 1, 1990. The prosecutor has evidence that on March 1, 1990 under very suspicious circumstances, the accused received other stolen property from A: the accused met A in an alley at 2:00 a.m., A demanded that the accused pay in \$1.00 bills, and the identification numbers on the items of personalty had been defaced. In this case, the prosecutor may offer the testimony about the March 1st incident without relying on any inference about the accused's general, bad character.<sup>75</sup> The March 1st incident should have placed the accused on notice that A is a fence for stolen property, and the jury may make the common sense inference that the accused's knowledge of A's status as a fence continued until September 1st.

In other cases, however, it is more difficult to determine whether the prosecutor has developed a legitimate noncharacter theory of relevance—or whether the prosecutor is merely endeavoring to cloak an illicit character theory. In a growing number of cases, prosecutors are citing the doctrine of objective chances as their theory of noncharacter relevance.<sup>76</sup> In the main, the courts have approved of prosecutors' invocations of the doctrine.<sup>77</sup> However, several commentators have argued that prosecutors are now smuggling inadmissible bad character evidence into the record under the guise of invoking the doctrine of objective chances.<sup>78</sup> The purpose of this section of the article is to assess that argument. The first part of this section describes the doctrine of chances and analyzes the use of the doctrine to prove the *actus reus* in the case. The next part of this section evaluates the more controversial application of the doctrine, namely, its use to establish *mens rea*.

---

75. *Id.* at §§ 5:21-28.

76. Comment, *supra* note 35, at 1225, 1227, 1233.

77. *E.g.*, *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974); *State v. Allen*, 301 Or. 569, 725 P.2d 331 (1986). *See also* *People v. Spoto*, No. 88 SC 611 (Colo., July 9, 1990) (WESTLAW, States library, Colorado file).

78. Ordover, *supra* note 64, at 168; Orfinger, *Battered Child Syndrome: Evidence of Prior Acts in Disguise*, 41 U. FLA. L. REV. 345, 362, 366 (1989).

### A. *The Use of the Doctrine of Chances to Prove the Actus Reus*

In the last decade, our society has come to the distressing realization that there is extensive child abuse in the United States.<sup>79</sup> Throughout the United States, prosecutors are making a more determined effort to convict child abusers.<sup>80</sup> There may be indisputable medical evidence that the alleged victim has suffered a fracture or subdural hematoma.<sup>81</sup> However, the accused often defends on the theory that the child sustained the injury accidentally. For example, the accused might contend that the child incurred the injury by falling off a swing set or down a flight of stairs. In these cases, the prosecutor's primary problem of proof is establishing an *actus reus*—a social loss or harm<sup>82</sup> caused by human agency.<sup>83</sup> At trial, the principal challenge facing the prosecution will be convincing the jury that the child's injury resulted from the intervention of another human being.<sup>84</sup> To meet that challenge, prosecutors frequently rely on the doctrine of chances.

*United States v. Woods*<sup>85</sup> is the paradigmatic case.<sup>86</sup> In *Woods*, the accused stood trial for infanticide. The victim had died of cyanosis. The accused claimed that the suffocation was accidental. To rebut the accused's claim, the prosecutor offered evidence that over a twenty-five year period, children in the accused's custody had experienced twenty cyanotic episodes.<sup>87</sup> The defense objected to the admission of the testimony on the ground that the testimony amounted to impermissible evidence of the accused's bad character.<sup>88</sup> However, the prosecution rejoined that the testimony was relevant on a noncharacter theory, that is, the doctrine of chances.<sup>89</sup>

Figure 3 depicts the theory of logical relevance underlying the doctrine. Under both the doctrine and the character theory shown in Figure 1, the trier of fact begins at the same starting point, the evidence of the accused's uncharged crimes. However, when the trier engages in character reasoning, the initial decision facing the trier is whether to infer from the evidence that the accused has a personal bad character.<sup>90</sup> In contrast, under the doctrine of chances, the trier need not focus on the accused's subjective character. Under the doctrine of chances, the initial decision facing the trier is whether the uncharged incidents are so numerous that it is objectively improbable that so many accidents would

---

79. Orfinger, *supra* note 78, at 345-46.

80. *Id.* at 346-47.

81. *Id.* at 348.

82. R. PERKINS & R. BOYCE, *supra* note 69, at 605.

83. Lacy, *Admissibility of Evidence of Crimes Not Charged in the Indictment*, 31 OR. L. REV. 267, 270-71 (1951-52).

84. W. LAFAVE & A. SCOTT, *supra* note 69, 3.1-2; R. PERKINS & R. BOYCE, *supra* note 69, 830-31.

85. 484 F.2d 127 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974).

86. Note, *Evidence—Proof of Prior Events Admissible Generally and Specifically to Demonstrate Corpus Delicti Because the Relevance of and Need for the Evidence Outweighed Its Prejudicial Impact*, 52 TEX. L. REV. 585 (1973-74).

87. *Woods*, 484 F.2d at 130.

88. *Id.* at 133.

89. *Id.* at 133-34.

90. Turcott, *Similar Fact Evidence: The Boardman Legacy*, 21 CRIM. L.Q. 43, 46 (1978-79).

befall the accused.<sup>91</sup> The decision is akin to the determination the trier must make in a tort case when the plaintiff relies on *res ipsa loquitur*. In the tort setting, the trier must decide whether objectively the most likely cause of the plaintiff's injury is the defendant's negligent act.<sup>92</sup> In the present setting, the trier must determine whether the more likely cause of the victim's injury is the act of another human being.

Assume *arguendo* that statistics compiled by the United States Public Health Service indicate that during a twenty-five year period, only two percent of American children experienced an accidental cyanotic episode. Contrast that figure with the incidence of cyanotic episodes experienced by the children in Ms. Woods' custody. Suppose, for example, that during the same twenty-five year period, twenty percent of those children had cyanotic episodes. The frequency of the episodes among those children far exceeds the national average for such episodes. The episodes are so recurrent among those children that it is objectively implausible to assume that all those episodes were accidental.<sup>93</sup> Either one or some of those episodes were caused by human intervention, or Ms. Woods is one of the most unlucky people alive.<sup>94</sup>

Like the theory of relevance shown in Figure 2, on its face the doctrine of chances differs from the character evidence theory depicted in Figure 1. More importantly, unlike the theory shown in Figure 2, the doctrine is distinguishable from a character reasoning theory in terms of the pertinent policies. The probative dangers posed by the doctrine differ to a marked degree from the risks raised by a character theory.

One risk raised by a character theory is that at least at a subconscious level, the jury will be tempted to punish the accused for uncharged misdeeds. That risk is acute under a character theory because the theory forces the jury to concentrate on the accused's personal character or disposition. The jurors must consciously address the question of the type of person the accused is. There is no need for the jurors to grapple with that question under the doctrine of chances. There is an undeniable possibility that on their own motion, the jurors may advert to the question. However, unlike a character theory, the doctrine of chances does not compel the jurors to focus on the accused's subjective disposition.<sup>95</sup> Consequently, the nature of the initial inferential step under the doctrine significantly reduces the risk of a decision on an improper basis.

The second probative danger raised by a character theory is that the jury will overvalue the probative worth of the item of evidence. Although general character has only slight<sup>96</sup> or small<sup>97</sup> relevancy to the issue of the accused's

91. *Id.* at 48-49; Comment, *Developments in Evidence of Other Crimes*, 7 U. MICH. J.L. REF. 535, 539 (1974).

92. C. MORRIS & C. MORRIS, *TORTS* 117-25 (2d ed. 1980); W. KEETON, *PROSSER AND KEETON ON THE LAW OF TORTS* §§ 39-40 (5th ed. 1984).

93. Comment, *supra* note 35, at 1225.

94. Elliott, *The Young Person's Guide to Similar Fact Evidence—I*, 1983 CRIM. L. REV. 284, 289.

95. E. IMWINKELRIED, *supra* note 4, at § 4:01, at 4-4.

96. 1 B. JEFFERSON, *CALIFORNIA EVIDENCE BENCHMARK* § 21.3 ; Comment, *Evidence—Other Crimes—Balancing Relevance and Need Against Unfair Prejudice to Determine the Admissibility of Other Unexplained Deaths as Proof of the Corpus Delicti and the Perpetrator's Identity*, 6 RUT.-CAM. L.J. 173, 183-84 (1974-75).

conduct on a specific occasion, we fear that the jurors will treat character as a reliable predictor of conduct.<sup>98</sup> There is less risk of overestimation of probative value under the doctrine of chances. The doctrine invites the trier to compare the accused's experience with statistical data or the trier's knowledge of everyday, human experience. We commonly accept the trier's knowledge of "the ways of the world" as a trustworthy basis for legal reasoning. That knowledge is one of the bases for the *res ipsa loquitur* doctrine;<sup>99</sup> and the jury instructions in many jurisdictions specifically encourage jurors to employ that knowledge as a basis for resolving factual disputes.<sup>100</sup>

Since the theory of relevance depicted in Figure 3 is distinguishable from the forbidden theory depicted in Figure 1, prosecutors may properly rely on the doctrine of chances as a noncharacter theory for satisfying Rule 404(b).<sup>101</sup> However, the courts should not admit uncharged misconduct evidence as a matter of course whenever the prosecutor asserts that the evidence is relevant under the doctrine of chances to prove the *actus reus*. Rather than accepting the prosecutor's argument as *ipse dixit*, the courts should carefully evaluate the evidence to ensure that the prosecutor has established the factual predicate for invoking the doctrine.<sup>102</sup> In theory, there is a distinction between character reasoning and the use of the doctrine of chances to establish the *actus reus*. However, in practice the distinction can be a thin,<sup>103</sup> difficult line for the jurors to draw; while the two doctrines posit different intermediate inferences, under both doctrines the jurors draw an ultimate inference of conduct. Moreover, the lax application of the doctrine of chances can eviscerate the character evidence prohibition. Just as every true crime includes a *mens rea*, an *actus reus* is an essential element of each true crime.<sup>104</sup> If uncharged misconduct becomes routinely admissible to prove the *actus reus*, there will be little left to the prohibition. Before admitting evidence of the accused's uncharged crimes to establish the *actus* under the doctrine of chances, the trial judge must ensure that the prosecutor has strictly satisfied the following foundational requirements.

97. Blakey, *An Introduction to the Oklahoma Evidence Code: Relevancy, Competency, Privileges, Witnesses, Opinion, and Expert Witnesses*, 14 TULSA L.J. 227, 271 (1978-79).

98. R. CROSS & N. WILKINS, *AN OUTLINE OF THE LAW OF EVIDENCE* 172 (1964).

99. See C. MORRIS & C. MORRIS, *supra* note 92; see W. KEETON, *supra* note 92.

100. E.g., 1 E. DEVITT & C. BLACKMAR, *FEDERAL JURY PRACTICE AND INSTRUCTIONS—CIVIL AND CRIMINAL* § 10.01, at 260 (3d ed. 1977) (this instruction tells the jury that in evaluating a witness' credibility, the jurors consider "the probability or improbability of the witness' statements . . ."); 1 L. SAND, J. SIFFERT, W. LOUGHLIN & S. REISS, *MODERN FEDERAL JURY INSTRUCTIONS* 7.01, at 7-4 (1984) ("In deciding the question of credibility, remember that you should use your common sense, . . . and your experience"). See also *United States v. Troop*, 890 F.2d 1393, 1397 (7th Cir. 1989) ("[j]uries, in reaching their verdicts, are allowed and expected to draw upon their common sense in evaluating what is reasonable to infer from circumstantial evidence").

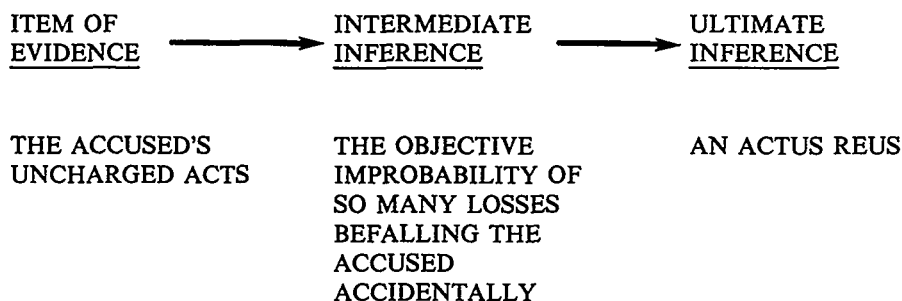
101. Comment, *supra* note 35, at 1227.

102. 1 B. JEFFERSON, *supra* note 96, at § 21.4.

103. *United States v. Bass*, 794 F.2d 1305, 1313 (8th Cir. 1986), cert. denied, 479 U.S. 869 (1986).

104. W. LAFAYE & A. SCOTT, *supra* note 69, at §§ 3.1-2; R. PERKINS & R. BOYCE, *supra* note 69, at 605-

Figure 3



*Each uncharged incident must be roughly similar to the charged crime.* In the hypothetical at the outset of this article, the prosecutor offered testimony about the accused's uncharged crime to establish the accused's identity as the perpetrator of the charged offense. The prosecutor argued that the uncharged incident was relevant on a noncharacter theory because both crimes evidenced the same, distinctive *modus operandi*. When the prosecutor relies on the *modus operandi* theory to establish identity, there must be a high degree of similarity between the charged and uncharged incidents.<sup>105</sup> Although the crimes need not be carbon copies,<sup>106</sup> the test is stringent.<sup>107</sup> The similarities must be so striking that they create the inference that all the acts are the handiwork<sup>108</sup> of the same criminal.<sup>109</sup> Assume, for example, a variation of the *Woods* fact situation. The body of the victim, who died of cyanosis, was found under a heavy blanket and several thick pillows. A year earlier another child in the accused's custody died of cyanosis. However, on the earlier occasion the body was found at the bottom of a hay stack on the premises. Since the two incidents lack a common "signature quality"<sup>110</sup> *modus*, the judge could not admit testimony about the earlier incident to show the accused's identity as the perpetrator of the charged offense.

To trigger the doctrine of chances, the uncharged incident must also be similar to the charged crime.<sup>111</sup> A dissimilar uncharged incident has at most a negligible effect on the probability of an accidental occurrence of the social

105. *Carter v. Hewitt*, 617 F.2d 961, 968 (3d Cir. 1980); Shifflet, *Admissibility of Evidence Disclosing Other Crimes*, 5 HASTINGS L.J. 73, 75, 76 (1953-54).

106. *United States v. Ingraham*, 832 F.2d 229, 232 (1st Cir. 1987), *cert. denied*, 486 U.S. 1009 (1988).

107. *United States v. Lail*, 846 F.2d 1299, 1301 (11th Cir. 1988).

108. *United States v. Morano*, 697 F.2d 923, 926 (11th Cir. 1983); *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979); *United States v. Park*, 525 F.2d 1279, 1284 (5th Cir. 1976).

109. *Raymond Leslie Morris*, 54 CRIM. APP. 69, 80 (1970).

110. *United States v. Gutierrez*, 696 F.2d 753, 755 (10th Cir. 1982), *cert. denied*, 461 U.S. 909 (1983); *United States v. Rappaport*, 19 M.J. 708, 713 (A.F.C.M.R. 1984); *People v. Alvarez*, 44 Cal. App. 3d 375, 383, 118 Cal. Rptr. 602, 606 (1975); *Dickey v. State*, 646 S.W.2d 232, 240 (Tex. Crim. App. 1983) (Teague, J., dissenting); *Collazo v. State*, 623 S.W.2d 647 (Tex. Crim. App. 1981).

111. Comment, *supra* note 35, at 1230, 1234.

harm.<sup>112</sup> However, the required degree of similarity is not as great as the degree necessary to invoke the *modus operandi* theory.<sup>113</sup> Under the doctrine of chances, it suffices that all the incidents fall into the same general category.<sup>114</sup> In the variation of the *Woods* case in the preceding paragraph, the earlier cyanotic episode would probably be admissible to help establish the *actus reus*. In both incidents, the cause of death was cyanosis; and it is the objective improbability of so many accidental cyanotic episodes which generates the inference of an *actus reus*.

*Considering the losses in both the charged and uncharged incidents, the accused has suffered the loss more frequently than the typical person endures such losses accidentally.* The courts and commentators intuitively recognize that when the prosecutor resorts to the doctrine of chances, it is highly relevant to consider the number of losses the accused has suffered. The *Woods* case is a classic example of the utilization of the doctrine because the twenty other cyanotic incidents were so numerous.<sup>115</sup> However, in analyzing the propriety of applying the doctrine in a particular case, the courts<sup>116</sup> and commentators<sup>117</sup> have tended to focus on the absolute size of the number of incidents. The debate is usually phrased in terms of the question of whether a single uncharged incident is enough to trigger the doctrine of chances.<sup>118</sup>

It is submitted that the focus on the absolute size of the number of incidents is wrong-minded. Instead, the courts should consider the relative frequency of the incidents. The most meaningful question is whether cumulatively, the losses suffered by the accused—the number of cyanotic episodes experienced by the accused's children or the number of fires at buildings owned by the accused—exceed the frequency rate for the general population. The total number of losses must reach an improbability threshold,<sup>119</sup> and the number reaches that threshold only when the frequency with which the accused suffers the losses is greater than the general frequency with which such losses occur.

Revisit the *Woods* fact situation. Assume again that during the relevant twenty-five year period, only two percent of the children in the United States experienced cyanotic episodes. During that period, the children in Ms. Woods' custody had twenty cyanotic incidents. Suppose that there were a total of 100 children in her custody during those twenty-five years. Thus, twenty percent of the children in the accused's custody experienced cyanotic episodes. The uncharged incidents are highly probative of an *actus reus* because the accused's incidence of losses is several times the frequency for the general population.

---

112. *Id.* at 1230.

113. *United States v. Baldarrama*, 566 F.2d 560, 567-68 (5th Cir. 1978), *cert. denied*, 439 U.S. 844 (1978); *United States v. Myers*, 550 F.2d 1036, 1045 (5th Cir. 1977), *cert. denied*, 439 U.S. 847 (1978); Shifflet, *supra* note 105, at 76; *State v. Ellis: The Other Wrongful Act Rule, Survey of Nebraska Law — Evidence* 15 CREIGHTON L. REV. 281, 288 (1981-82).

114. E. IMWINKELRIED, *supra* note 4, at § 3.11.

115. *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974).

116. *State v. Allen*, 301 Or. 569, 725 P.2d 331 (1986).

117. Comment, *supra* note 35, at 1228.

118. See *supra* notes 116 & 117.

119. Comment, *supra* note 35, at 1228.



The key is the relative frequency rather than brute number of incidents. Vary the facts. Suppose that Ms. Woods had been in charge of a huge orphanage during the twenty-five year period. During the twenty-five year period a total of 3,000 children were in the custodial care of the orphanage. The constant is that during the twenty-five year period, the children in her custody suffered a total of twenty cyanotic episodes. Should the judge admit the uncharged misconduct evidence in this variation of the *Woods* case? The answer is No. The evidence has not attained the improbability threshold. During the same period two percent of American children experienced cyanotic episodes. Although the absolute size of the number of uncharged incidents—twenty—is impressive, only 1.5 percent of the children in the accused's custody had cyanotic experiences. The relative frequency of the accused's losses does not make it objectively improbable that on the occasion of the charged offense, the child's death resulted from an *actus reus*.

How can the prosecutor establish the frequency with which the type of loss involved in the case occurs in the general population? There may be pre-existing data compilations. Government agencies or private research organizations might have gathered empirical data, for example, in the form of an epidemiological study.<sup>120</sup> The studies may be so authoritative that the data is judicially noticeable,<sup>121</sup> or the study may fall within the learned treatise exception to the hearsay rule.<sup>122</sup> If the data has not been compiled but it is accessible, the prosecutor can retain an expert to use recognized statistical techniques to gather the data establishing the frequency.<sup>123</sup> Failing all other methods, the prosecutor can ask the judge to rely on her conception of common, human experience to resolve the question whether the accused suffered the loss more frequently than the typical person could expect to sustain the loss. This last technique is imprecise. However, it is the same sort of judgment which the trial judge makes when the judge must decide whether a *modus operandi* is so unique that it is probably the handiwork of a single criminal. In making that decision, the judge rarely has the benefit of empirical data about the frequency with which a particular *modus* is utilized.<sup>124</sup> Yet every jurisdiction allows the judge to rely on common sense and experience to make that decision.

Of course, as the proponent, the prosecutor has the burden of establishing all the foundational facts conditioning the admissibility of the uncharged misconduct evidence under the doctrine of chances.<sup>125</sup> At the end of her analysis of

---

120. Dore, *A Proposed Standard for Evaluating the Use of Epidemiological Evidence in Toxic Tort and other Personal Injury Cases*, 28 How. L.J. 677 (1985).

121. Section 201(b)(2) of the Federal Rules of Evidence provides that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

122. FED. R. EVID. 803(18); Imwinkelried, *The Use of Learned Scientific Treatises Under Federal Rule of Evidence 803(18)*, 18 TRIAL Feb. 1982, at 56.

123. P. GIANNELLI & E. IMWINKELRIED, *SCIENTIFIC EVIDENCE* § 15-4(B) (1986).

124. *United States v. Rogers*, 769 F.2d 1418 (9th Cir. 1985) is an exceptional case. In that case, eyewitnesses described the bank robber as wearing a bandana. The prosecutor went to the length of presenting an F.B.I. agent's testimony that of the 1,800 bank robberies in the Los Angeles area during a certain time period, only two involved persons wearing a bandana.

125. E. IMWINKELRIED, *supra* note 4, at § 9:49.

all the foundational testimony the judge may genuinely doubt whether the frequency of the accused's losses exceeds the incidence for the general population. In that event, the judge has no choice but to exclude the prosecutor's evidence. If the judge has no satisfactory basis for determining the frequency of such accidental occurrences among the general populace, the judge may not admit the uncharged misconduct evidence under the aegis of the doctrine of chances.

*The issue of the occurrence of an actus reus must be in bona fide dispute; the prosecution must have a legitimate need to resort to the uncharged misconduct to prove the actus reus.* The first two foundational requirements, mandating proof of similarity and a frequency of loss exceeding the improbability threshold, flow from the character evidence prohibition codified in Rule 404(b). If either requirement is unmet, the prosecutor has not triggered the doctrine of chances; and the uncharged misconduct evidence does not possess relevance on a noncharacter theory. The last foundational requirement, though, flows from Federal Rule of Evidence 403.

Bare logical relevance on a noncharacter theory is not enough to guarantee the admissibility of uncharged misconduct evidence. The evidence must also pass muster under Rule 403. Rule 403 permits the judge to exclude logically relevant evidence when the accompanying probative dangers outweigh the probative value of the evidence. The Advisory Committee Note to Rule 403 indicates that in assessing the probative value of an item of potentially prejudicial evidence, the judge ought to consider whether the proponent has a bona fide need to introduce that item.<sup>126</sup>

We shall consider the question of the extent of the prosecution's need for uncharged misconduct evidence in detail in the next subsection devoted to the use of uncharged misconduct evidence to prove *mens rea*. We shall defer the in depth discussion of prosecution need until that subsection, since that subsection addresses the primary topic of this article, the use of uncharged crimes to establish intent. However, even an abbreviated discussion of the case law governing the use of other crimes to prove *actus reus* must make the point that the prosecutor may resort to other crimes evidence for that purpose only when the occurrence of the *actus reus* is in genuine dispute. In a 1990 decision,<sup>127</sup> the Court of Appeals for the Ninth Circuit made that point in emphatic fashion. The case was a habeas corpus proceeding based on a state conviction. Like Ms. Woods, the accused in this case was charged with infanticide. Unlike Ms. Woods, the accused did not contend that the decedent child suffered the injuries accidentally; as the Ninth Circuit commented, "[i]n the instant case, no claim was made that the child died accidentally."<sup>128</sup> Nevertheless, as in *Woods*, the trial judge permitted the prosecutor to introduce uncharged misconduct evidence for the stated reason that the evidence was relevant to prove the *actus reus*. The Ninth Circuit not only held that the trial judge erred; the court also ruled that

---

126. Adv. Comm. Note, FED. R. EVID. 403. ("The availability of other means of proof may also be an appropriate factor."); S. SALTZBURG, L. SCHINASI & D. SCHLUETER, *supra* note 12, at 362 (2d ed. 1986) ("actually disputed").

127. *McGuire v. Estelle*, 902 F.2d 749 (9th Cir. 1990).

128. *Id.* at 754.

the uncharged misconduct evidence was so virulent that the erroneous admission of the evidence denied the accused due process and rendered the trial fundamentally unfair.<sup>129</sup> The court emphasized that while highly prejudicial, the evidence had minimal probative value, since the accused had not disputed the issue of the occurrence of an *actus reus*.<sup>130</sup>

The Ninth Circuit's insistence that the issue be controverted is well taken. Uncharged misconduct evidence often has dual logical relevance; even when the evidence is relevant on a noncharacter theory, it also incidentally shows the accused's bad character.<sup>131</sup> If the charge is infanticide and the uncharged misconduct evidence establishes the death of several other children in the accused's custody, the criminal disposition inference is patent even when neither the prosecutor nor the judge mentions the inference. If the judge admits uncharged misconduct to prove the *actus reus* when the evidence has only tenuous<sup>132</sup> probative value for that purpose, there is a significant risk that the jurors will misuse the evidence by drawing the forbidden character inference.<sup>133</sup> Unless the prosecution has a bona fide need to use the evidence to prove the occurrence of an *actus reus*, the predominant effect<sup>134</sup> on the jurors' minds may be to "serve mostly to demonstrate that the Defendant had the propensity to commit the crime charged, the one impermissible use of such evidence."<sup>135</sup>

#### B. *The Use of the Doctrine of Chances to Prove the Mens Rea*

In criminal law, conduct can be "accidental" in two, very different senses. As subsection A explained, conduct can be accidental in the sense that the conduct does not represent an *actus reus*. A social loss such as a death can occur without the causal intervention of another human being; the death may be the result of "an act of God" such as an earthquake or flood.<sup>136</sup> As the *Woods* case illustrates,<sup>137</sup> when the accused claims that the conduct in question was accidental in this fundamental sense, the prosecutor may sometimes legitimately offer uncharged misconduct evidence under the doctrine of chances to negate the claim.

There is a second sense in which allegedly criminal conduct can be accidental. The accused may admit that he performed the *actus reus* but claim that he did so with an innocent state of mind.<sup>138</sup> For example, the accused may concede that he had possession of a contraband drug but deny that he knew

129. *Id.*

130. *Id.* The earlier opinion in *McGuire* appears at 873 F.2d 1323. See also *People v. Spoto*, No. 88SC611 (Colo., July 9, 1990) (WESTLAW, States library, Colorado file).

131. See Note, *Admissibility of Evidence of Similar Offenses in Criminal Prosecutions in West Virginia*, 54 W. VA. L. REV. 142 (1951).

132. Johnson, *The Admissibility of Evidence of Extraneous Offenses in Texas Criminal Trials*, 14 S. TEX. L.J. 69, 74 (1973).

133. Z. COWEN & P. CARTER, *ESSAYS ON THE LAW OF EVIDENCE* 120-23 (1956); Carter, *The Admissibility of Evidence of Similar Facts*, 69 LAW Q. REV. 80, 92 (1953).

134. *United States v. Burkhart*, 458 F.2d 201, 204 (10th Cir. 1972); Ordovery, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135, 147 (1989).

135. *United States v. Anthony*, 712 F.Supp. 112, 117 (N.D. Ohio 1989).

136. R. PERKINS & R. BOYCE, *supra* note 69, at 610.

137. *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974).

138. W. LAFAYE & A. SCOTT, *supra* note 69, at § 5.1.

that the substance was an illegal drug; he might testify that he thought that the substance was a lawful medicine.<sup>139</sup> Or an accused might admit that he received stolen property but defend on the theory that he was unaware that the property was stolen.<sup>140</sup> In this context, when the accused characterizes the conduct as "accidental," the accused means that he performed the act without the required *mens rea*.

Just as the government may offer evidence of the accused's other crimes to disprove "accident" in the first sense, the prosecutor may attempt to introduce uncharged misconduct evidence to negate "accident" in the second sense.<sup>141</sup> Dean Wigmore proposed the following hypothetical to exemplify this use of uncharged misconduct evidence:

[I]f A while hunting with B hears the bullet from B's gun whistling past his head, he is willing to accept B's bad aim . . . as a conceivable explanation; but if shortly afterwards the same thing happens again, and if on the third occasion A receives B's bullet in his body, the immediate inference (i.e., as a probability, perhaps not as a certainty) is that B shot at A deliberately; because the chances of an inadvertent shooting on three successive similar occasions are extremely small; or (to put it another way) because inadvertence or accident is only an abnormal or occasional explanation for the discharge of a gun at a given object, and therefore the recurrence of a similar result (i.e., discharge towards the same object, A) excludes the fair possibility of such an abnormal cause and points out the cause as probably a more natural and usual one, i.e., a deliberate discharge at A. In short, similar results do not usually occur through abnormal causes; and the recurrence of a similar result . . . tends (increasingly with each instance) to negative . . . inadvertence . . . or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act; and the force of each additional instance will vary in each kind of offense according to the probability that the act could be repeated, within a limited time and under given circumstances, with an innocent intent.<sup>142</sup>

Essentially, Dean Wigmore relies on the theory of logical relevance depicted in Figure 4. Like the theory shown in Figure 3, this theory enables the jury to reason about the case without relying on any forbidden inferences about the accused's subjective, personal character. As under Figure 3, the intermediate inference in this theory is a conclusion about the objective improbability<sup>143</sup> of the accused's innocent involvement in so many similar incidents such as instances of possession of contraband drugs or receipts of stolen property.

---

139. *United States v. Meneses-Davila*, 580 F.2d 888 (5th Cir. 1978); *United States v. Greenwood*, 6 C.M.A. 209, 215-16, 19 C.M.R. 335, 341-42 (1955).

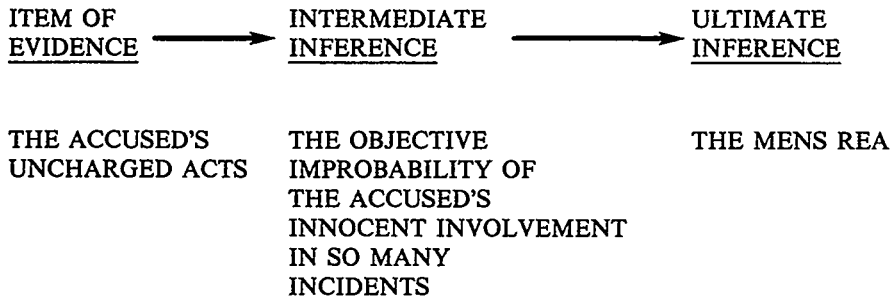
140. R. PERKINS & R. BOYCE, *supra* note 69, at 394-405.

141. Comment, *Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b)*, 61 WASH. L. REV. 1213, 1226-27 (1986).

142. 2 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 302, at 241 (1979).

143. Ordover, *supra* note 134, at 168.

Figure 4



However, like the theory depicted in Figure 3, this theory can easily be abused. As Section II noted, intent is an essential element of every true crime.<sup>144</sup> Whenever the prosecutor has evidence of an uncharged crime similar to the charged offense, the prosecutor can attempt to invoke Wigmore's doctrine of chances; the prosecutor can always argue that a similar uncharged crime triggers the doctrine of chances and is, therefore, logically relevant on a noncharacter theory both to disprove accident and thereby to prove *mens rea*. If the courts accept these arguments uncritically, the prosecutor may be able to introduce bad character evidence in disguise.<sup>145</sup> Unfortunately, as one commentator has already observed,<sup>146</sup> there is mounting evidence that the courts have tended to be too receptive to prosecutors' invocation of the doctrine of chances to prove *mens rea*.<sup>147</sup>

To counter this tendency, the courts should clearly enunciate and rigorously enforce the foundational requirements applicable when the prosecutor relies on the doctrine of chances to establish *mens rea*. The requirements parallel the foundational requirements for invoking the doctrine to prove the *actus reus*.

*Each uncharged incident must be roughly similar to the charged crime.* To bring the doctrine into play, the prosecutor must show that the uncharged incident is similar to the charged offense. As Dean Wigmore emphasized in the analysis of his famous hypothetical, the facts give rise to an inference of *mens rea* because "the chances of an inadvertent shooting on three successive similar occasions are extremely small . . . ."<sup>148</sup> It flies in the face of common sense to assume that on all three occasions, the accused had an innocent state of

144. W. LAFAVE & A. SCOTT, *supra* note 69, at §§ 3.1, 3.4-.5, 3.8; R. PERKINS & R. BOYCE, *supra* note 69, at 826-40 (3d ed. 1982).

145. Ordover, *supra* note 134, at 168.

146. *Id.*

147. In *Harvey v. State*, 604 P.2d 586 (Alaska 1979), the Supreme Court of Alaska reversed a criminal conviction because the trial judge permitted the prosecution to introduce uncharged misconduct evidence to disprove accident and establish *mens rea* even though the accused did not defend on the basis of lack of *mens rea*.

148. 2 J. WIGMORE, *supra* note 142, § 302, at 241 (1979).

mind;<sup>149</sup> a coincidence of three, inadvertent, similar acts is objectively unlikely.<sup>150</sup>

In several respects, this foundational requirement tracks the corresponding requirement which the prosecutor must satisfy when the government relies on the doctrine of chances to prove the *actus reus*. The degree of similarity between the charged and uncharged incidents need not be as great as the degree required when the prosecutor relies on the *modus operandi* theory to prove identity.<sup>151</sup>

Further, under both applications of the doctrine of chances, the prosecutor must demonstrate that the physical elements of the charged and uncharged offenses are similar.<sup>152</sup> The earlier discussion of the *Woods* case pointed out that the charged and uncharged incidents were sufficiently similar to trigger the doctrine of chances because all the incidents involved the same medical condition, cyanosis.<sup>153</sup> While the physical elements must be similar,<sup>154</sup> the courts apply the similarity requirement laxly. Suppose, for example, that the accused is charged with knowing possession of heroin and defends on the basis that he was unaware that the substance in his possession was a contraband drug. In all likelihood, the court would permit the prosecutor to introduce testimony about uncharged incidents in which the accused was found in possession of marijuana<sup>155</sup> or amphetamines.<sup>156</sup> In short, the physical elements of the charged and uncharged events need not be identical.<sup>157</sup>

The courts are less tolerant of dissimilarities between the victims of the charged and uncharged incidents.<sup>158</sup> When the charged crime is a sexual offense against a young girl, the judge may exclude prosecution testimony about an uncharged offense against a boy.<sup>159</sup> If the charged offense is a sexual offense against a child, the judge may bar evidence of an uncharged crime against an adult.<sup>160</sup> In a case charging an assault on a police officer, the judge may well sustain a defense objection to evidence of uncharged attacks on private persons.<sup>161</sup> The courts should insist that the victims be similar when the prosecutor offers uncharged misconduct evidence under the doctrine of chances to prove

---

149. *United States v. Semak*, 536 F.2d 1142, 1145 (6th Cir. 1976).

150. *Id.*

151. *See, e.g., United States v. Peterson*, 20 M.J. 806 (N.M.C.M.R. 1985); *People v. Robbins*, 45 Cal. 3d 867, 755 P. 2d 355, 248 Cal. Rptr. 172 (1988), *cert. denied sub. nom., Robbins v. California*, 109 S. Ct. 849 (1989).

152. Comment, *supra* note 141, at 1230-31. *See also State v. Pratt*, 309 Or. 205, 785 P.2d 350 (1990).

153. *See supra* notes 105-14 and accompanying text.

154. Roth, *Understanding Admissibility of Prior Bad Acts: A Diagrammatic Approach*, 9 PEPPERDINE L. REV. 297, 310 (1982). *See also Case Note, Evidence: Prior Crimes Used to Show Specific Intent and Identity*, 50 MARQ. L. REV. 133, 134 (1966).

155. *United States v. Skramstad*, 649 F.2d 1259 (8th Cir. 1981).

156. *United States v. Parkison*, 417 F.Supp. 730 (E.D. Wis. 1976).

157. *See generally Note, Evidence—Admissibility of Other Crimes*, 18 WAKE FOREST L. REV. 571, 582 (1982).

158. Comment, *supra* note 141, at 1230.

159. *Garza v. State*, 632 S.W.2d 823 (Tex. Crim. App. 1982).

160. Comment, *supra* note 141, at 1230. *See also People v. Spoto*, No. 88SC611 (Colo., July 9, 1990) (WESTLAW, States library, Colorado file).

161. *United States v. Jaqua*, 485 F.2d 193 (5th Cir. 1973). *See also United States v. San Martin*, 505 F.2d 918 (5th Cir. 1974).

*mens rea*. The focus is the accused's state of mind. The accused's intent may vary with the victim's identity. The accused may have radically different attitudes toward different groups of persons, and the trier can infer wrongful intent much more confidently if the accused has victimized the same type of person on other occasions.

*Considering the accused's involvement in both the charged and uncharged incidents, the accused has been involved in such events more frequently than the typical person.* Proof of similarity between the charged and uncharged incidents is a necessary condition to invoking the doctrine of chances. However, standing alone, proof of similarity is insufficient to bring the doctrine into play. Another necessary condition is proof that the accused has been involved in similar incidents so often that it is objectively unlikely that he became involved innocently. This foundational requirement is obviously similar to the second foundational requirement applicable when the prosecutor relies on the doctrine of chances to prove the occurrence of an *actus reus*. In applying both requirements, the judge must engage in relative frequency analysis. However, the requirements differ in kind and degree, and the differences may make it more difficult for the prosecution to satisfy this foundational requirement when the issue is the accused's *mens rea*.

The requirements for the two applications of the doctrine of chances differ in kind because the application determines the nature of the frequency the judge must analyze. When the prosecutor invites the court to apply the doctrine to prove the *actus reus*, the focus is on the frequency of a particular type of loss—the death of a child in a person's custody or the fire at a person's building. In contrast, when the prosecutor asks the court to employ the doctrine to establish *mens rea*, the relevant frequency is the incidence of the accused's personal involvement in a type of event—the discharge of a weapon in Wigmore's hypothetical, the possession of contraband drugs, or the receipt of stolen property. To intelligently decide whether the prosecutor's evidence exceeds the objective improbability threshold,<sup>162</sup> the judge must define the correct relative frequency.

The difference in kind between the foundational requirements under the two applications of the doctrine of chances results in a further difference in degree. The requirements differ in the practical degree of difficulty of proving the relevant frequencies. There are many empirical studies documenting the incidence of social losses such as cyanotic episodes, deaths caused by asphyxiation, and fires. Quite apart from the utility of this data to judges struggling with the application of the doctrine of chances, there are other important social reasons for collecting the data. Many of these data collections play a critical role in medical diagnosis. Other data collections are useful to businesses such as insurance companies. In a given case, it may be relatively easy for the prosecutor to marshal the frequency data needed to satisfy the foundational requirement applicable when the question is the occurrence of the *actus reus*.

However, it is far more difficult to find the relevant frequency data when the question is the existence of the *mens rea*. There may be little or no data on

---

162. Comment, *supra* note 141, at 1227.

such questions as how often the typical citizen is likely to be found in possession of contraband drugs or stolen property. The judge is more likely to have to rely on her common sense and knowledge of human experience. The extent of the judge's pertinent knowledge may be an intuitive belief that the inadvertent possession of illicit drugs or stolen property is probably a "once in a lifetime" experience for an innocent person. Thus, there is ordinarily more conjecture when the prosecutor invokes the doctrine of chances to prove *mens rea*—all the more reason, of course, to employ the doctrine cautiously. As when the prosecutor relies on the doctrine of chances to prove the *actus reus*, the burden of proving the preliminary facts rests on the prosecutor.<sup>163</sup> If after weighing all the foundational testimony the judge believes that it would be speculative to find that the prosecution has attained the improbability threshold, the judge should exclude the uncharged misconduct evidence.

*The issue of the existence of the mens rea must be in bona fide dispute; the prosecution must have a legitimate need to resort to the uncharged misconduct evidence to prove intent.* Subsection A observed that uncharged misconduct offered to prove the *actus reus* must pass muster under Federal Rule 403 as well as under Rule 404(b).<sup>164</sup> The same observation obtains when the prosecution attempts to introduce evidence of the accused's other crimes to establish the *mens rea*. The prosecution must have a bona fide need to resort to the potentially prejudicial uncharged misconduct evidence.<sup>165</sup> To assess the extent of the prosecution need, the judge must painstakingly evaluate the state of the record when the prosecutor offers the evidence. There are four possible variations of the state of the record.

In one variation, the accused has already affirmatively disputed the issue of the existence of the *mens rea*. There are several ways in which the accused could do so. During opening statement,<sup>166</sup> the defense attorney might assert that at the time of the *actus reus*, the accused had an innocent state of mind. The accused<sup>167</sup> or a defense witness<sup>168</sup> may give testimony calling into question the existence of the *mens rea*. If a prosecution witness' testimony points to the existence of the *mens rea*, a pointed cross-examination by the defense attorney could serve to place intent in doubt.<sup>169</sup> The common denominator in these cases is that intent is more than a purely formal issue. The accused is actively contesting<sup>170</sup> the intent issue. All courts agree that this state of the record warrants

163. E. IMWINKELRIED, *supra* note 4, § 9:49 (1984).

164. See *supra* note 126 and accompanying text.

165. S. SALTZBURG, L. SCHINASI & D. SCHLUETER, *supra* note 12, at 362 ("actually disputed"). See also *United States v. Brooks*, 22 M.J. 441 (C.M.A. 1986); *United States v. Rappaport*, 22 M.J. 445 (C.M.A. 1986).

166. *United States v. Badolato*, 710 F.2d 1509 (11th Cir. 1983); *United States v. Olsen*, 589 F.2d 351 (8th Cir. 1978), *cert. denied*, 440 U.S. 917 (1979); *United States v. Cohen*, 489 F.2d 945, 950 (2d Cir. 1973).

167. *United States v. Erb*, 596 F.2d 412 (10th Cir. 1979), *cert. denied*, 444 U.S. 848 (1979). See also Comment, *Defining Standards for Determining the Admissibility of Evidence of Other Sex Offenses*, 25 UCLA L. REV. 261, 277 (1977).

168. *People v. Nible*, 200 Cal. App. 3d 838, 246 Cal. Rptr. 119, 247 Cal. Rptr. 396 (1988).

169. E. IMWINKELRIED, *supra* note 4, at § 8:14 (1984).

170. *United States v. Kaiser*, 545 F.2d 467 (5th Cir. 1977); *United States v. Broadway*, 477 F.2d 991 (5th Cir. 1973); *Bunch v. State*, 605 S.W.2d 227 (Tenn. 1980); Elliott, *The Young Person's Guide to Similar Fact Evidence—I*, 1983 CRIM. L. REV. 284, 292, 296 (1983).



the receipt of otherwise admissible uncharged misconduct evidence to establish *mens rea*.

Now shift to the variation at the polar extreme. Assume that the parties have entered into a formal stipulation as to the existence of intent.<sup>171</sup> The accused might have decided to defend on a theory other than lack of *mens rea*. If the accused and the prosecution stipulate to the existence of the intent, the stipulation effectively removes the *mens rea* issue from the range of dispute in the case. In this state of the record, all courts agree that unless the uncharged misconduct evidence is relevant to another issue, the evidence is inadmissible to prove intent.

While it is easy to determine the proper outcome in the first two variations of the state of the record, the next two variations are troublesome.

In the third variation, although there is no formal stipulation, the accused informally concedes the *mens rea* issue. There might be several reasons why the accused would be willing to informally concede intent absent a formal stipulation. In many jurisdictions, the accused cannot compel the prosecution to enter into a stipulation.<sup>172</sup> Even if the accused offered to formally stipulate, the prosecution might reject the offer. Or the defense might be reluctant to enter into a formal stipulation. Suppose, for instance, that the accused intended to defend on an alibi or misidentification theory.<sup>173</sup> Even though the accused does not contemplate contesting the intent element of the crime, the accused might be leary of stipulating that whoever committed the *actus reus* possessed the requisite *mens rea*. Unless the judge clearly explains the law governing stipulations,<sup>174</sup> a juror might suspect that any accused who knew enough about the crime to stipulate to the *mens rea* must have been personally involved in the crime. The juror might not realize that evidence law permits parties to stipulate to the existence of facts which they lack personal knowledge of.

In this light, the accused may well find herself in a situation in which she is willing to informally concede the existence of *mens rea*. Assume that the defense counsel assures<sup>175</sup> the trial judge that during both opening statements and closing argument, the defense counsel will expressly state that as far as the defense can tell, the perpetrator of the charged crime possessed the required *mens rea*. The defense counsel also assures the judge that the defense will not object if the judge mentions and highlights the informal concession during the final jury charge.<sup>176</sup> If the defense makes and lives up to these assurances, the

---

171. There is currently a sharp split of authority among the courts over the question of whether the accused can force the prosecution to enter into a stipulation as to the existence of an ultimate fact in the case. E. IMWINKELRIED, *supra* note 4, at § 8:11 (1984). An analysis of that split of authority is beyond the scope of this Article.

172. E. IMWINKELRIED, *supra* note 4, at § 8:11 (1984).

173. *Id.* at § 8:13.

174. See generally E. IMWINKELRIED, EVIDENTIARY FOUNDATIONS 307-12 (2d ed. 1989).

175. If the defense attorney reneges on the assurance during summation, the prosecution may move to reopen the evidence. *People v. Tassel*, 36 Cal. 3d 77, 83 n.3, 679 P.2d 1, 4 n.3, 201 Cal. Rptr. 567, 570 n.3 (1984).

176. In many states, the trial judge has lost the common-law power to comment on the evidence. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 418-21 (1971). It would not constitute "comment" for the judge to merely mention the defense's informal concession; even in jurisdictions barring judicial comment on the weight of the evidence, the judge may sum up. *Id.* However, the judge should go beyond merely summarizing the state of the

trial judge should exclude any uncharged misconduct testimony offered to prove *mens rea*. It is true that there is still a chance that the jurors could acquit for want of evidence of intent. However, given the defense concessions and the judicial comment, it would be highly irrational for the jurors to do so. Realistically, the possibility is so remote that it does not justify exposing the accused to the much livelier possibility that the jury will misuse the testimony as general bad character evidence. On balance, the judge should rule the uncharged misconduct evidence inadmissible in this variation.

In the last variation of the state of the record, although the accused explicitly defends on another theory such as alibi or misidentification, the accused is unwilling to even informally concede the *mens rea*.<sup>177</sup> The defense attorney may want to leave open the possibility that the jury will acquit for lack of evidence of intent. The defense attorney might be especially tempted to follow this tack when the charge requires a special *mens rea* element and the jury instruction on the *mens rea* element seems to impose an onerous burden on the prosecution.

In this variation, the prosecution should generally be entitled to introduce otherwise admissible uncharged misconduct evidence to establish the *mens rea*. When the prosecutor is relying on the doctrine of chances to prove *mens rea* rather than the *actus reus*, there may be little admissible evidence of the *mens rea* other than uncharged crimes evidencing the same intent.

The *actus reus* is a social loss caused by human agency.<sup>178</sup> There is often readily available physical evidence of the loss itself. In a homicide prosecution, a forensic pathologist can describe the body and authenticate photographs of the cadaver. Moreover, the prosecution may have expert testimony attesting that the loss was caused by human agency. Based on the wound pattern on the cadaver, the pathologist can opine that the manner of death was homicidal.<sup>179</sup>

In contrast, in the typical case in which the prosecutor attempts to establish the *mens rea*, the prosecutor may have little alternative evidence. In rare cases, the prosecutor is fortunate; the prosecutor has evidence that shortly before, during, or shortly after the crime the accused made statements reflecting the *mens rea*. However, more commonly, the prosecutor has no evidence of such statements. Worse still, the prosecutor often has no physical evidence or expert testimony. The prosecutor may be able to prove a death by producing a photograph of the cadaver, but no camera is capable of capturing and recording the *mens rea* of intent to kill. Further, the courts are more reluctant to admit testimony about *mens rea* by mental health experts than testimony about manner of death by forensic pathologists.<sup>180</sup> There has been extensive criticism of expert testimony by psychiatrists and psychologists.<sup>181</sup> There is widespread skepticism

---

record. The judge should tell the jury that there is no real dispute over the existence of the *mens rea*. Since the prohibition of judicial comment is designed to protect the accused, the accused should be deemed competent to waive the prohibition.

177. E. IMWINKELRIED, *supra* note 4, at §§ 8:13, 8:15.

178. See *supra* notes 82-84 and accompanying text.

179. P. GIANNELLI & E. IMWINKELRIED, *supra* note 123, § 19-10(B), at 750-52.

180. See generally P. GIANNELLI & E. IMWINKELRIED, *supra* note 123, Ch. 9.

181. *Washington v. United States*, 390 F.2d 444, 455-56 (D.C. Cir. 1967) (Bazelon, C. J.); Burger, *Psychiatrists, Lawyers and the Courts*, 28 FED. PROBATION 3, 7 (June 1964); Shell, *Psychiatric Testimony: Science or*

about the ability of mental health experts to retrospectively determine an accused's state of mind. In part due to that skepticism, in 1984 Congress amended Federal Rule of Evidence 704 to add the following language:

No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.<sup>182</sup>

It is true that the prosecutor can invite the jury to infer the *mens rea* from the percipient witnesses' testimony describing the evidently rational, calculating manner in which the perpetrator committed the *actus reus*.<sup>183</sup> In an exceptional case, that inference might be virtually conclusive evidence of an accompanying criminal intent.<sup>184</sup> However, that inference may be the prosecutor's only evidence of intent other than any available uncharged misconduct testimony. The prosecutor typically has many more evidentiary options when she endeavors to prove the *actus reus*. Apart from the uncharged misconduct testimony, there may be a dearth of evidence usable to establish *mens rea*.

In addition, if the defense refuses to concede the existence of *mens rea* and the judge nevertheless excludes the prosecution's uncharged misconduct evidence probative of intent, the jury instructions may make it very difficult for the prosecution to sustain its burden of proof. Absent a defense concession, the judge will have to charge the jury on the essential elements of the crime, including the *mens rea*. There is substantial authority that even absent an express defense request, the trial judge has a *sua sponte* obligation to instruct the jury on the elements of the charged offense.<sup>185</sup> We must assume that the jurors will be attentive to the instructions and apply them conscientiously. On that assumption, there is a good possibility that the jury will acquit for want of evidence of intent. When the question is the existence of the *mens rea*, the prosecutor ordinarily has a much more compelling need to resort to probative uncharged misconduct evidence. If the accused does not at least informally concede the existence of the *mens rea*, the prosecutor should presumptively<sup>186</sup> be entitled to introduce evidence of similar, sufficiently frequent uncharged incidents to prove intent under the doctrine of chances.

*Fortune-Telling?*, BARRISTER 8 (Fall 1980). See also ZISKIN, *The Importance of Hard Data to Software Techniques*, in SCIENTIFIC AND EXPERT EVIDENCE 1097, 1100-02 (2d ed. 1981).

182. FED. R. EVID. 704(b). See Note, *Resurrection of the Ultimate Issue Rule: Federal Rule of Evidence 704(b) and the Insanity Defense*, 72 CORNELL L. REV. 620 (1987).

183. E. IMWINKELRIED, *supra* note 4, § 8:20 (1984).

184. See Comment, *supra* note 141, at 1221-22, 1223-25. Suppose, for example, that a hidden surveillance camera happened to videotape a murder on a business premises. The film shows the perpetrator load the weapon, hide in wait for the victim, shoot the victim three times, poke the body to ensure that the victim was dead, and fire a final shot for good measure. Viewing the film, any juror in his or her right mind would conclude that the perpetrator possessed the intent to kill at the time of the *actus reus*.

185. E.g., *People v. Geiger*, 35 Cal. 3d 510, 674 P.2d 1303, 199 Cal. Rptr. 45 (1984); *People v. Wickersham*, 32 Cal. 3d 307, 650 P.2d 311, 185 Cal. Rptr. 436 (1982). Cf. *People v. Modesto*, 59 Cal. 2d 722, 382 P.2d 33, 31 Cal. Rptr. 225 (1963).

186. It is arguable that even absent a defense concession, the uncharged misconduct evidence should be inadmissible when the testimony about the *actus reus* almost conclusively demonstrates the existence of the *mens rea*. See *supra* note 183. However, such cases will be extremely rare.

## IV. CONCLUSION

Following the example of the United Kingdom,<sup>187</sup> our courts may one day relax the character evidence prohibition in criminal cases. Distinguished American commentators have called for that relaxation.<sup>188</sup> However, at least for the interim, the American courts seem determined to adhere to the conventional prohibition.

If we are to continue to make any pretense of enforcing the prohibition, we must repudiate both of the doctrines discussed in this Article. The character evidence prohibition is violated when we permit a prosecutor to rely on the theory depicted in Figure 2 to justify the admissibility for uncharged misconduct evidence. As Section II of this Article hopefully demonstrated, that theory of admissibility is character evidence pure and simple.<sup>189</sup> While the theory differs cosmetically from traditional character reasoning, the theory squarely poses both of the probative dangers inspiring the character evidence prohibition. If the prosecutor's only argument for the admission of uncharged misconduct evidence is that theory of logical relevance, the prohibition mandates the exclusion of the evidence.

The rejection of the theory depicted in Figure 2 will give prosecutors even more incentive to resort to the doctrine of objective chances. As Section III noted, a doctrine of chances theory possesses legitimate, noncharacter relevance. However, the theory is susceptible to abuse. The distinction between a verboten character theory and a permissible chances theory is a thin line<sup>190</sup> which a lay juror could easily lose sight of. To guard against that risk, the courts should rigorously enforce the foundational requirements for triggering the doctrine of chances. The courts should admit uncharged misconduct evidence under the doctrine to prove *mens rea* only when the prosecutor can make persuasive showings that each uncharged incident is similar to the charged offense and that the accused has been involved in such incidents more frequently than the typical person. The prosecutor's uncharged misconduct testimony must satisfy both foundational requirements to ensure genuine noncharacter relevance under Rule

---

187. In *Regina v. Boardman*, 1975 App. Cas. 421, the House of Lords decided to relax the rigid character evidence prohibition. The Lords concluded that the difference between character and noncharacter theories of logical relevance is largely a difference of degree. Lord Cross argued that in a given case, an act of uncharged misconduct might have so much probative value—even on a character theory—that it would be an affront to common sense to exclude testimony about the misconduct. However, the Lords made it clear that the uncharged crime must have extraordinary probative value on a character theory to warrant admissibility. In the great majority of criminal cases, English courts still find character evidence inadequately probative. See also Carter, *Forbidden Reasoning Permissible: Similar Fact Evidence a Decade After Boardman*, 48 MODERN L. REV. 29 (1985). "Like Banquo's ghost," the distinction between character and noncharacter theories "reappears to demand attention" in English law. Allan, *Similar Fact Evidence and Disposition: Law, Discretion, and Admissibility*, 48 MODERN L. REV. 253, 263 (1985).

188. See Hutton, *Commentary: Prior Bad Acts Evidence in Cases of Sexual Contact with a Child*, 34 S.D. L. REV. 604 (1989); Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777 (1981); Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845 (1982).

189. Myers, *Uncharged Misconduct Evidence in Child Abuse Litigation*, 1988 UTAH L. REV. 479, 526 (1988).

190. *United States v. Bass*, 794 F.2d 1305 (8th Cir. 1986), cert. denied sub. nom., *Price v. United States*, 479 U.S. 869 (1986).

404(b). Even if the prosecutor can surmount the similarity and relative frequency hurdles, the judge should exclude the evidence under Rule 403 unless the intent issue is in bona fide dispute.

Intellectual honesty demands the repudiation of both of the doctrines currently threatening to engulf the character evidence prohibition. If we are going to modify or abolish the prohibition, it should be done explicitly in a straightforward fashion—not by legerdemain.

